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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO GOMEZ,

Defendant and Appellant.

C037702

(Super. Ct. No.  
SF079544A)

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAN NUNEZ,

Defendant and Appellant.

C037996

(Super. Ct. No.  
SF079544B)

Defendants Marco Gomez and Adan Nunez were tried jointly on various criminal charges.

The jury found that Gomez was guilty of two counts of assault with a deadly weapon, against Michael Coffman and Angel Mata (Pen. Code, § 245, subd. (a)(1) -- counts 2 and 4)<sup>1</sup>; that Gomez committed these two felonies for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); and that Gomez personally inflicted great bodily injury on the victims. (§ 12022.7, subd. (a).)

The jury found that Nunez was not guilty of some of the charges and lesser included offenses, and the jury deadlocked on the remaining charges against him. On the date set for retrial, Nunez entered a negotiated plea of no contest to count 2, styled as "assault with a deadly weapon." Nunez entered his plea with the understanding he would be placed on probation with various conditions, including that he register as a gang offender. (§§ 186.30-186.32.)

Gomez was sentenced to an aggregate term of 19 years in prison and was ordered to register as a gang offender. In accordance with his plea agreement, Nunez was granted probation on conditions that included he serve one year in county jail and register as a gang offender. We consolidated their appeals.

Nunez and Gomez both contend the gang offender registration statute is unconstitutionally vague and overbroad. In addition, Gomez claims (1) the gang enhancement finding is not supported by substantial evidence, (2) a gang expert impermissibly opined that

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<sup>1</sup> Further section references are to the Penal Code unless otherwise specified.

the gang enhancement allegation was true, and (3) the trial court erred in failing to instruct the jury with an element of the gang enhancement.

We will dismiss Nunez's appeal because it attacks the validity of a condition of his plea but he failed to obtain a certificate of probable cause. (§ 1237.5; Cal. Rules of Court, rule 31(d) [hereafter, rule 31(d)].) As for Gomez's appeal, we will construe the gang offender registration requirement in a manner that defeats his attack; and we will reject his other claims of error.

#### DISCUSSION

##### DEFENDANT GOMEZ'S APPEAL

###### I

One who commits a violent felony to benefit a criminal street gang is subject to a 10-year sentence enhancement. (§ 186.22, subd. (b)(1)(C).) "Criminal street gang" means "any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e)*, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal activity." (§ 186.22, subd. (f), *italics added*.)

Gomez contends the gang enhancement must be stricken because it is unsupported by the evidence. Gomez has a "massive burden" to prevail on this claim. (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) We review the record in the light most favorable to the judgment to determine whether it discloses evidence that is

reasonable, credible, and of solid value, such that any rational trier of fact could have found the essential elements of the enhancement beyond a reasonable doubt. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is "unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The evidence showed that the victims, Coffman and Mata, were members of the "South Side Locos," a gang under the "Sureno" gang umbrella. Defendants Gomez and Nunez were members of the enemy "West Side Locos" (WSL), one of the "Norteno" gangs.

On May 13, 2000, Coffman was driving around when he saw Nunez traveling in the opposite direction with Gomez as a passenger. The rivals exchanged angry shouts. Nunez made a U-turn and followed Coffman. After Coffman and Gomez flashed knives at each other, Nunez and Gomez appeared to break off the chase.

Shortly thereafter, Coffman picked up Mata and they drove to a gas station. Gomez and Nunez arrived at the station while Coffman was pumping gas. Gomez got out of the car, quickly walked toward Mata, and stabbed him in the stomach and arm with a large knife. Meanwhile, Nunez got out of the car and began fighting with Coffman. When Coffman fell to the ground, Nunez continued to pummel him while Gomez came over and stabbed Coffman in the chest and abdomen.

Sergeant Michael Cook testified as a gang expert based upon his six years of experience investigating gang-related crimes in Manteca; his special gang training; and his conversations with

other peace officers, gang members and their victims, and witnesses to crimes committed by criminal street gangs. Cook was familiar with the WSL gang. The prosecutor asked Cook, "in your opinion[,], does the WSL gang have as one of its primary activities the commission of certain crimes?" Cook answered, "Yes, they do." The prosecutor next asked Cook, "What crime or crimes is it they primarily commit?" Cook replied, "I have seen them engage in a pattern of sale of drugs, assault with deadly weapons, attempted murders, auto theft." Cook testified that he knew of specific WSL members who had been convicted of such crimes. He named one WSL member who was convicted of vehicle theft (Veh. Code, § 10851) and a second WSL member who was convicted of attempted murder (§ 664, subd. (a)) and possession of methamphetamine for sale (Health & Saf. Code, § 11378). In addition, Cook stated that WSL "does have a history of drug sales." (See *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [expert testimony sufficient to establish primary activity element of the criminal street gang enhancement].)

The attempted or completed crimes of WSL members, including the two felonies for which Gomez was convicted in this case (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 320, 323), are predicate crimes listed in the gang enhancement statute. (§ 186.22, subd. (e)(1) [assault with a deadly weapon]; (e)(3) [unlawful homicide or attempted murder]; (e)(4) [possessing a controlled substance for sale]; (e)(25) [vehicle theft].)

Nevertheless, Gomez argues (1) the evidence "showed precisely one occurrence each of four different offenses" (2) thus compelling

the conclusion that the prosecution "failed to meet its burden of proving that any of these offenses constituted a 'primary activity' of [WSL]," as required by the statute. (§ 186.22, subd. (f).) We disagree.

The evidence establishes Gomez himself committed two assaults with a deadly weapon. Moreover, gang expert Cook testified that members of WSL had engaged in "drug sales" (plural), "attempted murders" (plural), and "assault with deadly weapons" (plural in a grammatically incorrect form). The fact Cook identified by name only two WSL perpetrators of specific instances of such crimes does not establish that those particular crimes were committed only once each by WSL.

In any event, there is no merit in Gomez's argument that a criminal street gang enhancement cannot be predicated on the "one-time-only" commission of specified felonies because those crimes "having been shown to occur but once each, cannot, by virtue of their singular, one-time-only appearances, constitute 'primary' activities [of the gang] within the meaning of [*People v. Sengpadychith, supra*, 26 Cal.4th 316]."

"Criminal street gang" means an ongoing group of three or more persons, whether formal or informal, having as one of its primary activities the commission of *one or more* of the felonies specified in the statute. (§ 186.22, subds. (e) & (f).) This does not mean the gang must specialize in, or concentrate on, a particular crime, i.e., commit a specified felony more than once for its criminal conduct to be a "primary activity" of the criminal street gang. Rather, "[s]ufficient proof of the gang's primary activities might

consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute" (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324, orig. italics), i.e., gang members have consistently and repeatedly committed either one specified felony or have consistently and repeatedly committed a combination of felonies specified by the statute. (See *id.* at p. 323.) Indeed, it would be absurd to construe the statute not to apply to a gang that diversifies its criminal conduct.

Here, the evidence that Gomez stabbed two rival gang members with a deadly weapon and that other members of Gomez's street gang engaged in automobile theft, possessed controlled substances for sale, and attempted to commit murder was sufficient to support the finding that the gang had as one of its "primary activities" the commission of one or more of the felonies specified in section 186.22, subdivision (e).

## II

In the trial court, Gomez unsuccessfully moved to preclude gang expert Cook from testifying "to the ultimate facts such as was this crime committed for a gang purpose." Gomez expressly abandons that objection on appeal. Instead, he claims the expert improperly offered a "personal opinion" that the gang enhancement was true.

Gomez has waived this claim of error because he did not make a specific objection on that ground at trial. (Evid. Code, § 353, subd. (a).) Moreover, the contention fails on the merits.

Cook never expressed an opinion that the gang enhancement was true. After being presented with a hypothetical question,

he merely testified that a stabbing based on the facts he was asked to assume would, in his opinion, have been gang-related and committed for the benefit of a street gang for various reasons. This type of testimony is permissible. (*People v. Gardeley, supra*, 14 Cal.4th at p. 619 [gang expert may express an opinion regarding "a 'hypothetical' based on the facts of the [case]"].) Moreover, the jurors were instructed that an expert opinion is only as good as the facts upon which it is based (CALJIC No. 2.80) and that the jurors were required to "decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved" and, if not, how that affected the weight of the expert opinion (CALJIC No. 2.82). And other elements of the enhancement still had to be proved. Accordingly, there was no error.

### III

Next, Gomez contends the trial court erroneously failed to instruct the jurors that, to find the gang enhancement true, they had to find that WSL had "as one of its primary activities the commission of one or more of the criminal acts" enumerated in the statute. (§ 186.22, subd. (f).)

This claim of error lacks merit because the record shows the court included this element of the enhancement, as item number 4 of the "criminal street gang" definition, in the written and oral instructions to the jury.

### IV

Section 186.30, subdivision (a), provides that Gomez must register with an appropriate law enforcement agency "within 10 days of release from custody" and thereafter at the other times stated.



Section 186.32 describes the registration requirements, providing among other things: "A written statement, signed by the adult, giving any information that may be required by the law enforcement agency, shall be submitted to the law enforcement agency."

(§ 186.32, subd. (a)(2)(C).)

Gomez contends that, to the extent this requirement compels him to provide "any information" the agency sees fit to request, the statute is vague and overbroad on its face, and permits arbitrary and discriminatory enforcement.

The People retort that, since Gomez will not have to register until he is released from prison, we should decline to address this claim of error because it is not ripe. In the People's words, "[Gomez's] challenge to the gang registration statute is premature, because [the statute] may have changed drastically by the time of his release from prison. Since the statute is regulatory, not penal, its statutory form at the time [he] registers will apply to [him], and the version of the statute in effect at the time of his conviction will be irrelevant."

However, the requirements for registration as a gang offender are not just regulatory. Under the statutory scheme, a knowing violation of the registration requirements is a crime punishable as a misdemeanor (§ 186.33, subd. (a)), and the failure to comply with the requirements calls for a sentencing enhancement if the violator commits a felony specified in section 186.30. (§ 186.33, subd. (b)(1).) And it is sheer speculation that the statutory scheme may be amended before Gomez is released on parole. Thus, withholding resolution of the issue at this time may result in a

hardship to Gomez and another court proceeding if the statute is not amended and he is compelled to seek relief when he is released from prison. For this reason, we will proceed to the merits of his claim of error. (See *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149 [18 L.Ed.2d 681, 691; accord, *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.)

Gomez concedes the statutory scheme would not be vague and overbroad if the reporting requirement were limited to supplying any information that is reasonably related to criminal street gang activity. Relying on the reasoning of *In re Walter S.* (2001) 89 Cal.App.4th 946, a case in which review has been granted by the California Supreme Court (review granted Sept. 19, 2001, S099120), he argues the "any information" requirement of section 186.32 must be narrowly construed to mean any information necessary for a law enforcement agency to locate the registrant, such as his full name, aliases, date of birth, place of residence, description and license number of any vehicle the registrant owns or drives, and employment information.

By suggesting that the information required by the registering agency "will . . . most likely [be] narrowly tailored," the People in effect concede an interpretation much broader than that urged by Gomez would be unconstitutional.

The generally recognized purposes of registration statutes are to help control crime and deter recidivism by ensuring that persons convicted of certain offenses will be readily available for police surveillance and apprehension. (See *People v. Castellanos* (1999) 21 Cal.4th 785, 796 [registration of sex offenders]; *In re Luisa Z.*

(2000) 78 Cal.App.4th 978, 982 [registration of sex offenders, narcotics offenders, and arsonists]; see also *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117 [a statute will not be held void for vagueness "'if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources,'" quoting *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 116].)

Accordingly, we construe the requirement that Gomez submit a "written statement . . . giving any information that may be required by the law enforcement agency" (§ 186.32, subd. (a)(2)(C)) to mean he must provide any information necessary for the agency to locate him or help law enforcement identify him as a suspect in other crimes, such as: his full name; any aliases, if any; his place and date of birth; his physical description (including any unique characteristics, such as tattoos and scars); all of his temporary and permanent residences; a description and the license number of any vehicle he owns or drives; his driver's license number; where he attends school, if any; his place of employment, if any; and the name, address, and telephone number of his parole officer.

#### DEFENDANT NUNEZ'S APPEAL

At the combined plea and sentencing hearing on January 22, 2001, the trial judge stated the terms of the plea agreement as follows: Nunez is "going to admit Count 2, the [violation of section] 245, for a felony local one year. [¶] It's my understanding in talking to my clerk that for the time he's spent in so far a felony local one year will be CTS [credit for time served] tomorrow.

[¶] He's also going to have to register that this is a gang-related crime. The[re will] be a search waiver for any gang paraphernalia. [¶] He'll [have to] pay a restitution fine of \$220. [¶] He's going to be on five years['] felony probation. [¶] He's going to be aware it's a strike. [¶] And he's also going to have to stay away from [the] West Side [Locos] . . . ."

Immediately after the court described the terms of the plea agreement, Nunez's counsel stated: "That's what we understand it is, Your Honor." The court next apprised Nunez of the rights that he would waive by entering the agreement, obtained his waivers of those rights, and discussed other aspects of the agreement with him:

"THE COURT: . . . [¶] Do you [Nunez] understand the maximum confinement time on this is four years. You're going to get what is known as a felony local for a year and credit for time served. My understanding is you'll be released sometime tomorrow. [¶] Do you understand that?

"[NUNEZ]: Yes, I do.

"THE COURT: Do you also understand that you'll have to register [as a gang offender]? This is a gang-related crime. And you'll be on probation for a period of five years. [¶] Do you understand that?

"[NUNEZ]: Yes, sir."

The parties stipulated that the preliminary hearing transcript provided a factual basis for the plea. After Nunez pled no contest to assault with a deadly weapon, the trial court imposed the gang offender registration requirement as one of the conditions of

probation. It also granted the prosecution's motion to dismiss all remaining charges and enhancement allegations. The following colloquy then ensued at the very conclusion of the hearing:

"[DEFENSE COUNSEL]: Your Honor, for the record we understand that the Court is imposing the registration requirement. [¶] However, there is some belief that section as presently written is not legal. I'd hate to have stood here and say we are in agreement that the section is legal. So we don't want--

"THE COURT: So you're not waiving any disagreement with the constitutionality?

"[DEFENSE COUNSEL]: Not waiving anything about in the future what may be said about registration."

On appeal, Nunez filed opening and reply briefs making a facial challenge to the constitutionality of the gang offender registration statute. We directed the parties to file supplemental briefs on the question: "Does [Nunez's] failure to comply with the requirements of Penal Code section 1237.5 and rule 31(d) of the California Rules of Court require dismissal of his appeal raising only a constitutional challenge to a material term of his plea agreement, namely, the condition of probation requiring him to register pursuant to Penal Code section 186.32?"

Section 1237.5 prohibits any appeal from a judgment entered after a plea of guilty or no contest unless the defendant files a statement in the trial court showing a reasonable ground to challenge the legality of the proceedings *and* the defendant obtains

from that court a certificate of probable cause for the appeal.<sup>2</sup> Rule 31(d) implements the statute, making two exceptions to the certificate requirement. Only one of the exceptions is at issue here -- a defendant need not obtain a certificate of probable cause if the appeal "is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity . . . ." (Rule 31(d).)<sup>3</sup>

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<sup>2</sup> Section 1237.5 states in full: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk."

<sup>3</sup> In pertinent part, rule 31(d) states: "If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate. [¶] If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds."

An appellate attack upon a term of a plea agreement is a challenge to the validity of the plea, thus requiring compliance with the probable cause certificate requirements of section 1237.5 and rule 31(d). (*People v. Panizzon* (1996) 13 Cal.4th 68, 72-73, 78, 90.)

In this case, imposition of the gang offender registration requirement as a condition of probation was an express term of the plea agreement that Nunez made with the prosecution. Consequently, by claiming that the probation condition is unconstitutional, Nunez is attacking an integral part of the plea, i.e., challenging its validity. Because this challenge requires compliance with section 1237.5 and section 31(d), and Nunez failed to do so, we must dismiss his appeal.

Nunez disagrees, arguing the registration requirement was a "component of the sentence imposed solely by the trial court." The record contradicts this claim -- before taking Nunez's plea of no contest, the trial court explicitly identified the registration requirement as a term of the plea agreement.

Defendant argues his trial counsel's subsequent comment that he and defendant "understand that *the Court* is imposing the registration requirement" (emphasis added), demonstrates that the condition was imposed by the trial court unilaterally rather than in accordance with the terms of the plea agreement. The argument is unconvincing. The remark came at the end of the hearing *after* the court had imposed the gang offender registration requirement *pursuant to the plea agreement*.

Nunez also contends dismissal of his appeal is inappropriate because he purports to appeal from the trial court's order of March 20, 2001, denying his postsentencing motion to modify the terms of probation. (See § 1203.3.) The motion asserted that the Manteca Police Department asked Nunez to answer numerous questions on a "GANG REGISTRATION FORM." Nunez claimed some of the questions were "inappropriate in defendant's circumstances" and others were unconstitutionally overbroad because they invaded his Fifth Amendment right against self-incrimination. Nunez also argued that section 186.32, subdivision (a)(2)(C), allowed police unfettered discretion in deciding what information he should provide. The motion asked the trial court to either delete the registration requirement or to limit the information the police could request.

Based on these postsentencing events, Nunez claims that the matters making the probation condition unconstitutional became apparent only later, hence the certificate requirement does not apply since his appeal is based on "'grounds . . . occurring after entry of the plea which do not challenge its validity[.]'" (Quoting rule 31(d).) The argument fails.

Nunez's appeal is a strictly facial attack on section 186.32, subdivision (a)(2)(C). Nowhere in his opening and reply briefs does Nunez argue that the registration statute is unconstitutional *as applied* to him or because of any *particular question* on the police form. Neither brief cites the pages of the appellate record containing the form, and he does not argue that the trial court erred in denying his postsentencing motion to modify probation.



Hence, the appeal actually is an attack on the registration requirement of the plea agreement itself, rather than a challenge to the police department's or trial court's interpretation of the scope of the requirement.

Even where a defendant claims his appeal is based on grounds "occurring after entry of the plea," a certificate of probable cause is still required if the appeal, like this one, *in substance* challenges the validity of the plea. (Rule 31(d); *People v. Panizzon*, *supra*, 13 Cal.4th at pp. 73-74, 76, 78 [rejecting view that appeal is based only on post plea events even though the defendant asserted that the disproportionality of his sentence did not become apparent until his codefendants were later sentenced to shorter terms]; see *People v. Ribero* (1971) 4 Cal.3d 55, 62-64 [certificate of probable cause required to appeal from the denial of post plea motion to withdraw plea; defendant cannot avoid requirements of section 1237.5 by labeling the denial of the motion as an error in a post plea proceeding; "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made"].)

#### DISPOSITION

The judgment is affirmed as to defendant Gomez. Defendant Nunez's appeal is dismissed.

We concur: \_\_\_\_\_, SCOTLAND, P.J.

\_\_\_\_\_, BLEASE, J.

\_\_\_\_\_, RAYE, J.

